

JAMES S. THOMSON
California SBN 79658
Attorney and Counselor at Law
732 Addison Street, Suite A
Berkeley, California 94710
Telephone: (510) 525-9123
Facsimile: (510) 525-9124
Email: james@ycbtal.net

TIMOTHY J. FOLEY
California SBN 111558
Attorney at Law
1017 L Street, Number 348
Sacramento, California 95814
Telephone: (916) 599-3501
Email: tfoley9@earthlink.net

Attorneys for Defendant
JUSTIN GRAY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JUSTIN GRAY, et al
Defendants.

Case No. 1:20-cr-00238-JLT-SKO

**JUSTIN GRAY'S REPLY TO
OPPOSITION AND RESPONSE TO
MOTION FOR DISCLOSURE OF
GRAND JURY SCHEDULES,
INSTRUCTIONS AND MATERIALS
(MOTION, Doc # 1122)**

Date: September 4, 2024

Time: 1:00 PM

Place: Courtroom 7, Hon. Sheila Oberto

Defendant Justin Gray, through counsel, has filed a motion for an order of disclosure of ministerial and procedural grand jury records. Doc. # 1122. The government has filed an opposition and response. Doc. # 1200. Mr. Gray files this reply to the government's response.

Before addressing the specific requests in order, two preliminary matters should be addressed.

First, portions of the government's response suggest that the standard articulated in 28 U.S.C. § 1867(f) is applicable here. Doc. # 1200, 3-4. This assertion is incorrect.

1 That statutory provision applies to requests for “records or papers used by the jury
 2 commission or clerk in connection with the jury selection process.” Those records are the
 3 subject of a separate motion, Doc. # 1125. The instant motion pertains to schedules and
 4 instructions involving the grand jury that returned the indictment in this case, not the
 5 selection process of the grand jurors. It is the proper subject of a pretrial motion brought
 6 before the Magistrate Judge. See Federal Rule of Crim. Pro. 12(b)(1); see also, e.g.,
 7 *United States v. Jack*, 2009 WL 435124 (E.D. Cal. 2009) (Order re Defendants’ Motion
 8 for Disclosure of Ministerial Grand Jury Records); *United States v. Diaz*, 236 F.R.D. 470
 9 (N.D. Cal., 2006).

10 Second, the government “inquires”, in its conclusion, “whether the motion should
 11 be heard by the Chief District Judge and consolidated with [the separate motion, Doc. #
 12 1125].” Doc. # 1200, 10. The motion regarding jury selection matters, Doc. # 1125, was
 13 brought before Chief Judge Mueller pursuant to Section 6.02 of the Juror Management
 14 Plan, General Order 678. Again, the instant motion, Doc. # 1122, relates to matters
 15 involving the grand jury that returned the indictment in this case, not the selection process
 16 of the grand jurors, and is the proper subject of a pretrial motion brought before the
 17 Magistrate Judge.

18 Turning to the specific requests for disclosure:

19 **1. The grand jury’s dates of commencement and termination, and any court**
 20 **orders or documents relating to the dates of commencement and termination.**

21 The government does not object to the disclosure of “purely ministerial records”
 22 regarding the empanelment of the grand jury, provided that the names of the grand jurors
 23 and their identifying information are redacted. Doc. # 1200, 4.

24 As noted in the motion, the original indictment was returned on December 10,
 25 2020 (Doc. # 130), a superseding indictment on September 8, 2022 (Doc. # 430), a
 26 second superseding indictment on May 11, 2023 (Doc. # 622), and a third superseding
 27 indictment on June 3, 2024 (Doc. # 1098). The government has recently disclosed that
 28 the third superseding indictment was returned by a grand jury selected in 2022. Doc. #

1 1199, 4. The government’s response also discloses that the grand jury involved was the
 2 Fresno grand jury. Doc. # 1200, 2. Thus, the government’s disclosures indicate that the
 3 original indictment was returned by a previous grand jury, while a subsequent Fresno
 4 grand jury returned at least one of the superseding indictments. Consequently, Mr. Gray
 5 specifically requests the dates of commencement and termination, and any court orders or
 6 documents relating to the dates of commencement and termination, applicable to (1) the
 7 grand jury that returned the 2020 indictment, (2) the Fresno grand jury that returned the
 8 third superseding indictment (and, seemingly, the 2022 superseding indictments), and (3)
 9 any grand juries in between that considered this matter.

10 **2. The instructions given to the grand jurors.**

11 The government does not object to the disclosure of “purely ministerial records
 12 regarding any instructions given to the grand jurors by the Court.” Doc. # 1200, 4.
 13 Consequently, this Court should order disclosure of the general instructions given to the
 14 grand jurors who returned the third superseding indictment.

15 However, the government objects to the disclosure of instructions given by the
 16 United States Attorney’s Office during the course of the presentation to the grand jury.
 17 Doc. # 1200, 4. The government argues that the request is governed by Federal Rule of
 18 Criminal Procedure Rule 6(e) and that Mr. Gray has not shown a particularized need for
 19 disclosure of the instructions. Doc. # 1200, 5-9.

20 As noted in the motion, however, the request here is not within the scope of Rule
 21 6(e) as the instructions given to the grand jury are ministerial and do not touch upon the
 22 grand jury’s deliberations, investigations, or assessment of evidence. “[M]inisterial”
 23 records or materials relating to the grand jury are not covered by Rule 6(e)’s requirement
 24 of secrecy. See *In re Special Grand Jury*, 674 F.2d 778, 779-781 (9th Cir. 1982)(Public
 25 right of access to ministerial grand jury records); *United States v. Diaz*, 236 F.R.D. 470,
 26 479 (N.D. Cal. 2006) (“The public right of access to grand jury records that are purely
 27 ministerial requires no showing of particularized need on behalf of defendants.”)
 28

1 The government provides a string cite of opinions denying defense requests for
 2 grand jury instructions. Doc. # 1200, 8. Many of these opinions have rejected the
 3 argument that case-specific instructions are ministerial “ground rules”¹ outside the scope
 4 of Rule 6(e). See, e.g., *United States v. Morales*, 2007 WL 628678, at *4 (E.D. Cal.
 5 2007). But, contrary to the government’s suggestion, this point is far from settled. As the
 6 district court in *United States v. Belton* concluded:

7 The legal instructions given to the grand jury regarding the charges on
 8 which they are deliberating are a part of the “ground rules” by which the
 9 grand jury conducts its proceedings. The instructions do not reveal the
 10 substance of the grand jury’s deliberative process or other information that
 would compromise the secrecy that Rule 6 seeks to protect. Therefore,
 Defendant is entitled to disclosure of these instructions even without a
 showing of particularized need.

11 2015 WL 1815273 (N.D. Cal. 2015) at *3; see also *Jack*, 2009 WL 435124, at *4;
 12 *United States v. Crider*, 2021 WL 4169208, at *9 (S.D. Cal. 2021).

13 In actuality, “[a]lthough *Alter* was decided over 50 years ago, district courts remain
 14 split on whether to classify the legal instructions given to a grand jury as ministerial.”
 15 *United States v. Powell*, 2024 WL 3052966, at *2 (N.D. Cal. 2024).² The recent opinion
 16 in *Powell* resolved the question in a thoughtful way: an in camera review to see if the
 17 disclosure of the instructions would compromise the secrecy of the grand jury
 18 proceedings. *Powell*, 2024 WL 3052966, at *2; see also *Crider*, 2021 WL 4226149, at
 19 *9; *United States v. Ramirez-Ortiz*, 2021 WL 1662441, at *9 (S.D. Cal. 2021).

22 ¹ *United States v. Alter*, 482 F.2d 1016, 1029, n. 21 (9th Cir. 1973)(“The
 23 proceedings before the grand jury are secret, but the ground rules by which the grand jury
 24 conducts those proceedings are not.”)

25 ² See also *United States v. Pac. Gas & Elec. Co.*, 2015 WL 3958111, at *12 (N.D.
 26 Cal. 2015) (“A split of authority has developed regarding whether the legal instructions
 27 provided by the prosecutor to the grand jury are the kind of ‘ground rules’ subject to
 28 disclosure, or rather whether they go to the substance of the grand jury’s deliberation and
 are therefore afforded a presumption of secrecy. The Ninth Circuit has not yet addressed
 this precise question.”)

1 In assessing a request for grand jury documents, the *Diaz* court promoted a
 2 standard that favored disclosure where the documents “do not reveal the substance or
 3 essence of the grand jury’s investigation or deliberations.” *Diaz*, 236 F.R.D. at 476. The
 4 instructions requested here define the role of the grand jury and the guiding law the grand
 5 jury was required to follow. They do not reveal the investigation or the deliberations, nor
 6 do they reveal the witnesses or the testimony. As ministerial records, they should be
 7 disclosed.

8 **3. Records or orders related to any decision to transfer evidence from one grand**
 9 **jury to another involving this case.**

10 The government objects to this request, arguing that “[t]he decision to transfer
 11 evidence from one grand jury to another is within the sole discretion of the United States
 12 Attorney’s Office” and asserting that these are not ministerial records. Doc. # 1200, 9.

13 An order transferring evidence, and the instructions given to the grand jury
 14 regarding the consideration of that evidence, are matters that “generally relate to the
 15 procedural aspects of the impaneling and operation of the . . . Grand Jury, as opposed to
 16 records which relate to the substance of the . . . Grand Jury’s investigation.” *Diaz*, 236
 17 F.R.D. at 476, quoting *Special Grand Jury*, 674 F.2d at 779, fn 1. As such, they are
 18 ministerial, and, like the general instructions given to the grand jury by the court, the
 19 orders and instructions relating to the transfer of evidence should be disclosed.

20
 21 Dated: August 13, 2024

Respectfully submitted,

/s/ James S. Thomson

/s/ Timothy J. Foley

24 JAMES J. THOMSON
 25 TIMOTHY J. FOLEY
 Attorneys for JUSTIN GRAY